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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
MARCH TERM, 1981

NO. 80-6368

HOWARD JONES, Petitioner,

vs.

WALTER D. ZANT, WARDEN, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Howard Jones, by his undersigned counsel, asks leave to file his Petition for Writ of Certiorari to the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis. An affidavit by Petitioner in support of this Motion is attached hereto.

James C. Bonner, Jr.
475 N. Lumpkin St.
Athens, GA 30601
(912) 542-4241

Henry C. Johnson, Jr.
119 E. Maple St.
Decatur, GA 30030
(404) 377-5531

ATTORNEYS FOR PETITIONER

A F F I D A V I T

I, Howard Jones, being first duly sworn according to law, depose and say, in support of my Motion for Leave to Proceed without being required to prepay costs and to proceed in forma pauperis:

1.

That I am the Petitioner in the above-styled case.

2.

That because of my poverty I am unable to pay the costs of said Petition for Writ of Certiorari, and that I own no real or personal property, and that I am incarcerated and receive no income from earnings.

3.

That I am unable to give security for said Petition for Writ of Certiorari.

4.

That I believe that I am entitled to the redress I seek by said Petition for Writ of Certiorari.

WHEREFORE, I offer this Affidavit for use in support of the above and foregoing Motion and for any other lawful purpose.

Howard Jones

The foregoing Affidavit of Howard Jones was sworn to and subscribed before me this 25th day of March, 1981.

Notary Public

Notary Public, Georgia, State at Large
My Commission Expires June 19, 1984

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 25 day of March 1981

Henry C. Johnson, Jr

Attorney for Petitioner

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SUPREME COURT, U.S.

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NO. 80-6368

Supreme Court, U.S.
FILED
MAR 16 1981
Alexander L. Stevas, Clerk

HOWARD JONES, Petitioner

v.

WALTER D. ZANT, WARDEN, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

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March 16, 1981

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CITATIONS

Cases:

Jones v. The State, 243 Ga. 820, 256 S.E.2d 907 (1979)

Jones v. Georgia, certiorari denied 44 U.S. 957 (1979), rehearing denied 444 U.S. 1027 (1980)

Stewart v. Ricketts, 451 F.Supp. 911 (M. Dist., Ga.) 1978

Townsend v. Sain, 372 U.S. 293 (1963)

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Robb v. Connally, 111 U.S. 624 (1884)

Young v. Ragen, 337 U.S. 235 (1949)

Frank v. Mangum, 237 U.S. 309 (1915)

IN THE
SUPREME COURT OF THE UNITED STATES
MARCH TERM, 1981

No._____

HOWARD JONES, Petitioner,

v.

WALTER D. ZANT, WARDEN, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

The petitioner, Howard Jones, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered in this proceeding on December 15, 1980.

OPINION BELOW

The Orders of the Georgia Supreme Court in denying petitioner's Application for Certificate of Probable Cause to Appeal and his Motion for Reconsideration of same, along with the Opinion of the Superior Court of Butts County, Georgia, are attached in the Appendix hereto.

JURISDICTION

The denial of petitioner's Motion for Reconsideration by the Georgia Supreme Court was entered on December 15, 1980. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Does the application of Georgia's habeas corpus procedure operate to abridge petitioner's privileges and immunities as a citizen of the United States when the State appellate court erroneously applied the doctrine of res judicata so as to deprive petitioner of his statutorily conferred right to litigate state and federal constitutional claims?

2. Does the application of Georgia's habeas corpus procedure operate to deprive petitioner of his liberty without due process of law when the State appellate court erroneously applies the doctrine of res judicata so as to deprive petitioner of his statutorily conferred right to litigate state and federal constitutional claims?

STATUTORY PROVISIONS INVOLVED

GEORGIA CODE ANNOTATED, § 50-127(1):

> "Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record.
>
> * * *
>
> "(1) Grounds for writ.-
> Any person imprisoned by virtue of a sentence imposed by a State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final."

STATEMENT OF THE CASE

Petitioner was convicted of one count each of armed robbery and murder, and was sentenced to the ultimate penalty of death on the latter count. Petitioner appealed his convic-

tion and death sentence to the Georgia Supreme Court, which affirmed, Jones v. The State, 243 Ga. 820, 256 S.E.2d 907 (1979), and this Court denied certiorari, Jones v. Georgia, certiorari denied, 444 U.S. 957 (1979), rehearing denied 444 U.S. 1027 (1980).

On direct appeal to the Georgia Supreme Court, petitioner herein alleged, inter alia, that he had been deprived of his Sixth Amendment right to effective assistance of counsel at his trial. The Georgia Supreme Court ruled that petitioner had not been denied effective assistance of counsel, and thus there was no Sixth Amendment infirmity. Jones v. State, supra at 243 Ga. 831.

Petitioner subsequently instituted a petition for writ of habeas corpus under Georgia Code Annotated, § 50-127(1) in the Superior Court of Butts County, Georgia, alleging newly discovered enumerations of ineffective assistance of counsel not raised nor considered by the Georgia Supreme Court on direct appeal, nor by any other court. The Superior Court ruled that since the issue of effective assistance of counsel had been raised and decided adversely to petitioner on direct appeal, then the doctrine of res judicata applied so as to bar the Superior Court's consideration of the new enumerations of ineffective assistance of counsel raised for the first time on habeas corpus.

Pursuant to Georgia Code Annotated, § 50-127(11)a, petitioner filed his Application for a Certificate of Probable Cause to Appeal in the Georgia Supreme Court alleging, inter alia, error on the part of the Superior Court in its finding that the new enumerations of ineffective assistance of counsel were res judicata. Said Court denied petitioner's Application, and his Motion for Reconsideration thereto, as well.

REASONS FOR GRANTING THE WRIT

I. The decisions below operate to abridge petitioner's privileges and immunities as a citizen of the United States.

Petitioner contends that the newly discovered enumerations of ineffective assistance of counsel were not and could not have been known to and raised by counsel on direct appeal, and thus the doctrine of res judicata has been erroneously applied so as to prevent petitioner from litigating in the State courts this important state and federal constitutional infirmity in his conviction and death sentence. Petitioner further contends that Georgia Code Annotated, § 50-127(1) affords him the right to litigate issues such as the one herein unless such issues are shown to have been waived, and petitioner would show this Court that no showing has been made that the petitioner waived any of the newly discovered enumerations of ineffective assistance of counsel raised for the first time on habeas corpus. Petitioner would show this Court that his inability to obtain a meaningful review in the Georgia courts of the constitutional infirmities raised for the first time on habeas corpus operates to abridge his privileges and immunities as a citizen of the United States.

Georgia Code Annotated, § 50-127(1) is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record, and provides in part as follows:

> "(1) Grounds for writ.-
> Any person imprisoned. . .who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia. . .may institute a proceeding. . . .Except for objections relating to the composition of a grand or traverse jury, rights secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently."

This section clearly confers upon petitioner the right to raise his Sixth Amendment allegations and have the same litigated in State court on habeas corpus, unless a showing is made that the same have been waived. The Superior Court did not find that the new grounds raised by petitioner had been waived, but found that it was bound by the Georgia Supreme Court's finding of no denial of effective assistance of counsel under the doctrine of res judicata. The petitioner does not dispute the fact that the doctrine of res judicata may be applied in habeas corpus cases generally, but would argue that said doctrine does not apply to this case because the new enumerations of ineffective assistance of counsel have not been ruled upon by any court, and said enumerations were not alleged on direct appeal because they were not discovered by counsel for petitioner until after access was gained to the prosecution's file by civil discovery instituted pursuant to petitioner's petition for habeas corpus under § 50-127 above.

It has been recognized that § 50-127 was enacted so as to accomplish the purpose of allowing State habeas corpus courts to hear all claims which a federal court would hear. See Stewart v. Ricketts, 451 F.Supp. 911, 915 (M.Dist., Ga.) 1978. Petitioner would show this Court that even though § 50-127 clearly enables him to pursue his Sixth Amendment allegations in State court, the purpose of said statute has been subverted so as to leave petitioner with only a federal forum in which to seek review of his constitutional claims. See Townsend v. Sain, 372 U.S. 293 (1963).

Upon the State courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the United States Constitution. Mooney v. Holahan, 294 U.S. 103, 113 (1935). Indeed, this Court has recognized that the State courts have an obligation to guard, enforce and protect every right granted or secured by the United States Constitution, and that judges of the State courts are sworn to support and uphold the Constitution and laws of the United States, and

that if they fail to do so, the aggrieved party may bring the case from the highest court of the State to the United States Supreme Court for a final and conclusive determination. Robb v. Connally, 111 U.S. 624 (1884).

In this case, the State of Georgia by statute has provided a mechanism for the litigation of state and federal constitutional claims by persons whose liberty is being restrained by virtue of a sentence imposed by a State court of record. The refusal herein of the Georgia state courts to afford petitioner a chance to litigate his Sixth Amendment claim operates to abridge petitioner's privileges and immunities as a citizen of the United States.

II. The decision below operates to deprive petitioner of his liberty without due process of law.

Petitioner's inability to obtain a meaningful review in the State courts of his Sixth Amendment claim also operates to deprive him of his liberty without due process of law.

This Court, in Mooney v. Holahan, recognized that the due process clause of the Fourteenth Amendment is applicable to the process of law by means of which notice is given and fair opportunity to be heard is afforded. Supra, at 104. This Court further concluded that where an act or ommission operates to deprive a defendant of notice or an opportunity to present such evidence as he has, then it can be said that due process of law has been denied. Supra, at 107. In the present case, the State court's refusal to afford petitioner an opportunity to litigate his Sixth Amendment claim is based on the erroneous application of the doctrine of res judicata. Such erroneous application of said doctrine deprives petitioner of his statutorily conferred right to bring a habeas corpus action in State court. This Court has held that a State must afford prisoners some clearly defined method by which they may raise claims of denial of federal rights. Young v. Ragen, 337 U.S. 235 (1949).

In the present case, the state has in place the procedure for vindicating petitioner's important constitutional rights, but has refused to allow petitioner to utilize such procedure as he is authorized by statute to do. Such refusal operates to deny petitioner's Fourteenth Amendment due process rights. This Court has held that where appellate review has been provided for by the State and the prisoner has had benefit of it, then such proceedings are to be regarded as part of the process of law under which such prisoner is held in custody by the State, and is to be considered in determining any question of alleged deprivation of his life or liberty without due process of law, contrary to the Fourteenth Amendment. See Frank v. Mangum, 237 U.S. 309. 327 (1915).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Order of the Georgia Supreme Court denying reconsideration of its denial of petitioner's Application for a Certificate of Probable Cause to Appeal.

Respectfully submitted,

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(912) 542-4241

COUNSEL FOR PETITIONER

March 16, 1981

HOWARD JONES,	:	CASE NO. 4558
Petitioner	:	
	:	SUPERIOR COURT OF
Vs.	:	BUTTS COUNTY, GEORGIA
WALTER D. ZANT, WARDEN,	:	
	:	PETITION FOR
Respondent	:	WRIT OF HABEAS CORPUS

O R D E R

The Petitioner in this case was charged with the offenses of murder and robbery and was tried before the Honorable Hubert C. Morgan and a Jury in DeKalb County, Georgia. He was found guilty by the Jury and the death sentence imposed. He received a life sentence on the robbery charge. These convictions were appealed and the Petitioner's case is reported at 243 Ga. 820.

One of the Petitioner's co-defendants was indicted for the offenses of murder and robbery. He entered a plea of guilty to the robbery charge in July, 1978, at which time the Court imposed a sentence of fifteen years to serve. In August, 1978, the Petitioner was tried and his co-defendant, James Ameen, testified against the Petitioner. After sentence was imposed against the Petitioner, the Trial Court on its own Motion entered a Nunc Pro Tunc sentence reducing the sentence of James Ameen from fifteen years to twelve years. The Petitioner contends that this occurrence requires a finding that the State must have granted some sort of immunity to Ameen for his testimony, or using the words of Petitioner's attorney, a "deal" was made.

The Assistant District Attorney handling the case in DeKalb County testified that the Trial Judge, after hearing the sworn testimony of Ameen and all the facts in the Petitioner's case, concluded that since Ameen was not the trigger man, that his sentence should be reduced. The Assistant District Attorney testified that he had not recommended this to the Court, and The State had nothing to do with the Judge changing his mind about the length of the sentence of the Petitioner's co-defendant.

This Court, upon considering the facts and circumstances of this ground, concludes that the Trial Court was well within its rights to reduce the sentence and the evidence does not show any impropriety in anyway, nor does it establish that some immunity was granted Petitioner's co-defendant, or that some "deal" was made. This Court concludes that this contention of the Petitioner is without merit.

The Petitioner employed his trial attorney, but he did not pay the entire fee as agreed upon. After the trial and verdict, the original attorney was permitted to withdraw, and thereafter, a Mr. Zachary of DeKalb County represented the Petitioner in the early stages of his appeal. The Petitioner was later represented by Brooks Franklin who appeared before the Georgia Supreme Court for Petitioner.

An evidentiary hearing was conducted in December after the Petitioner's conviction in August on the question of effective assistance of trial counsel. The Trial Court concluded that the

Petitioner did have effective assistance of counsel at the trial, and this finding was affirmed by the Supreme Court of Georgia at page 830 of the Opinion. Once this issue has been raised and decided by our Georgia Supreme Court, this Court is bound by the ruling and decision there made.

At the habeas corpus hearing, the Petitioner attempted to enlarge upon his original contention that he had ineffective assistance of counsel, and in so doing presented certain evidence to the Court to the effect that the original attorney did not file a Motion to Suppress Evidence, did not challenge the legality of the Petitioner's arrest, and did not file a Brady Motion and did not subpoena witnesses. The testimony of the Assistant District Attorney, as well as Petitioner's original attorney was that the attorney was given access to the District Attorney's file and was able to obtain in that informal manner all that could have been obtained by filing a Brady Motion. The basis for the Petitioner challenging the arrest and the warrants was that one of the warrants was dated October 31, 1978, the date of the offenses, and the other one was dated November 1, 1978, it being contended that the officers had no right to search the vehicle, nor the premises where Petitioner was arrested. This Court concludes that none of the aforesaid contentions are sufficient to change the original determination that Petitioner had effective assistance of counsel. It is the conclusion of this Court that the Petitioner has had effective assistance of counsel throughout his numerous hearings in connection with this case, and that he has not been denied

effective assistance of counsel.

The Petitioner contends that the Trial Court instructed the Jury that malice may be implied. In giving this charge to the Jury, the Trial Court was merely stating the definition of murder as it is defined in Code Section 26-1101. This contention is without merit. Burney vs. The State, 244 Ga. 33.

The next contention of the Petitioner is that counts one, two, and three of the petition objecting to the State's manner of striking the Jury for certain reasons have already been decided by the Supreme Court of Georgia in the Petitioner's appeal and found to be without merit. This Court holds that none of these grounds have any merit.

In Count seven, the Petitioner challenges the validity of the death penalty in Georgia. The Court holds that this is without merit and has already been ruled adversely to the contentions of the Petitioner by the Georgia Supreme Court and Supreme Court of the United States.

The Petitioner contends that the Trial Court did not adequately charge the Jury on mitigating circumstances and that the Court failed to make clear to the Jury that they had the option of returning a life sentence. This Court concludes that these contentions of the Petitioner are without merit.

The Petitioner further contends that the Trial Court and his trial attorney should have advised him as to his

constitutional right not to testify as to anything that might incriminate him. This Court concludes that under the facts of the case that the Petitioner did not in fact testify to anything that would tend to incriminate him, his testimony being related solely to a defense of alibi. This Court finds Petitioner's contention with respect to this without merit.

The Petitioner contends that he is entitled to public funds to pursue his post conviction remedies. This matter has been adversely decided to the Petitioner by the Georgia Courts and this request is denied.

In the habeas corpus transcript at page 188, the Petitioner attempted to introduce an affidavit by one Carol Hunstein. The Respondent objected to the Court admitting this affidavit on the grounds it was not served properly under the habeas corpus statute, he having received it only the afternoon prior to the hearing and the statute requires at least five days before the hearing. The Court sustained the objection upon the stated ground and further upon the grounds that it would be hearsay to admit the testimony and that the same is irrelevant to the issues in this case.

Upon considering all the facts and circumstances of this case, it is the finding of this Court that none of the Petitioner's constitutional rights have been denied and that he is in the lawful custody of the Respondent under the aforesaid sentences, and he is, therefore, remanded to the custody of the Respondent.

The Respondent shall pay the Court costs in this case.

This 4th day of August, 1980.

HUGH D. SOSEBEE,
SENIOR JUDGE, SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

FILED: Sept 8, 1980. Joline B. Williams, by to.

IN THE SUPREME COURT

STATE OF GEORGIA

HOWARD JONES, :

Appellant, :

v. : CASE NO. 4558

WALTER D. ZANT, :

Appellee. :

:

APPLICATION FOR CERTIFICATE

OF

PROBABLE CAUSE

Now comes Appellant, through his counsel, and moves this Court to grant a certificate of probable cause. In support of this application, Appellant shows:

1.

Appellant applied for a writ of habeas corpus in Butts County Superior Court, attacking his conviction and death sentence entered in DeKalb County Superior Court. The Butts County Superior Court, by order of August 7, 1980, denied Petitioner relief.

2.

Jurisdiction is conferred upon this Court by Art.VI, Sec.II, Par.IV of the Constitution of the State of Georgia. (Constitution of 1945, 32-3704).

3.

Appellant has raised substantive issues including new allegations of ineffective assistance of counsel not previously by the Georgia Supreme Court in it's finding on direct appeal that Appellant herein had not been denied effective assistance of counsel. The Butts County Superior Court concluded that it was bound by the findings of this Court and found that Appellant had not been denied effective assistance of counsel. The ruling of the Butts County Superior Court failed to consider the new allegations

of ineffective assistance of counsel not considered by this Court was violative of Georgia Code Ann. Section 50-127 (1) and acted to suspend the right to seek habeas corpus relief as guaranteed by the United States and Georgia Constitutions.

Appellant has raised other substantive issues including but not limited to the improper striking of jurors, the trial court's instruction to the jury that malice may be implied, the failure to adequately charge the jury on mitigating circumstances, and the failure of the trial court or an officer thereof to advise Appellant of his Fifth Amendment rights.

4.

Appellant, if not granted this certificate of probable cause, will be denied appellate review of the habeas court's ruling.

WHEREFORE, Appellant prays:

(a) That the Application for Certificate of Probable Cause be read and considered, and

(b) That the Certificate of Probable Cause be granted.

Respectfully submitted,

Henry C. Johnson Jr.
Attorney for Appellant

119 East Maple Street
Decatur, Georgia 30031
(404) 377-8831

Application No. 1366

SUPREME COURT OF GEORGIA

ATLANTA, October 8, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HOWARD JONES V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

IN THE SUPREME COURT

STATE OF GEORGIA

FILED IN OFFICE
OCT 20 1980
CLERK OF SUPREME
COURT OF GEORGIA

HOWARD JONES, :
Petitioner-Appellant, :
:
vs. : APPLICATION NO. 1366
:
WALTER D. ZANT, Warden, :
Respondent-Appellee :

MOTION FOR REHEARING

Comes now Howard Jones, Appellant above-named, through counsel, and moves this Honorable Court to reconsider it's Order of October 8, 1980 denying Appellant's application for a Certificate of Probable Cause To Appeal. In support of this Motion, Appellant shows:

1. Appellant was found guilty after a jury trial in the Superior Court of DeKalb County, Georgia on one count of armed robbery and one count of murder. He received a death sentence on the second count herein.

2. Appellant duly appealed his conviction and sentence to the Supreme Court of Georgia and this Court affirmed in an opinion decided June 20, 1979.

3. Several allegations of ineffective assistance of counsel were raised in Appellant's habeas corpus petition in Butts County, Georgia, which had not been raised by appellant on his direct appeal to this Court. Among these were:

(a) failure to file a "Brady" motion
(b) failure to discover the deal
(c) failure to discover contradictory statements made before trial by the co-defendant star witness for the state
(d) failure to discover and use said co-defendant's prior felony convictions for impeachment purposes
(e) failure to challenge the legality of appellant's arrest
(f) failure to file a Motion to Suppress
(g) failure to subpoena witnesses necessary for appellant's defense

4. The above issues, together with others raised in Appellant's habeas corpus petition created new issues for review which have not been decided by any Court, or by this Court.

5. The Butts County Superior Court's failure and refusal to consider these matters in Appellant's habeas corpus petition below and this Court's refusal to review said decision, along with this Court's refusal to consider the above allegations itself would deprive Appellant of an appellate review on the issues herein, and would reflect that Appellate review of habeas corpus petitions in death penalty cases in Georgia are lightly taken and that the death penalty is applied in an orbitrary and capricious manner in the State of Georgia and toward Howard Jones in particular.

WHEREFORE, Appellant prays:

(a) That this Court reconsider it's denial of a Certificate of Probable Cause To Appeal in the case of Jones v. Zant, and

(b) That upon reconsideration this Court grant a Certificate of Probable Cause To Appeal so that Appellant may have a full and complete review of the State claims by the Supreme Court of Georgia.

Respectfully submitted,

Henry C. Johnson Jr.

Henry C. Johnson, Jr.
Attorney for Appellant

119 East Maple Street
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(404)377-5531

Applic. No. 1366

SUPREME COURT OF GEORGIA

ATLANTA, December 15, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HOWARD JONES V. WALTER D. ZANT, WARDEN

Upon consideration of the Motion for Reconsideration filed in this application, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hadford, Deputy Clerk.

Cert. 2

NO. 80-6368

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

HOWARD JONES,

Petitioner,

v.

WALTER D. ZANT,
WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

NICHOLAS G. DUMICH
Assistant Attorney General
Counsel of Record for
the Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Bldg.
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Atlanta, Georgia 30334
(404) 656-3499

10

QUESTION PRESENTED

Whether Petitioner's rights, under either the Due Process Clause of the Fourteenth Amendment or the Privileges and Immunities Clause of Article IV, Section II, of the United States Constitution, have been violated by the state habeas corpus court's ruling that it considered itself bound by the decision of the Georgia Supreme Court which held Petitioner had not been deprived of effective assistance of counsel?

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SINCE PETITIONER'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE WERE THOROUGHLY REVIEWED BY THE GEORGIA SUPREME COURT ON DIRECT APPEAL, AND SINCE THE PETITIONER HAS SHOWN NO CHANGE IN THE LAW OR FACTS WHICH JUSTIFY A RELITIGATION OF THAT ISSUE, THE STATE HABEAS CORPUS COURT PROPERLY FOLLOWED ESTABLISHED GEORGIA LAW, AND HELD THAT RELIEF UNDER THIS ALLEGATION WAS NOT WARRANTED	4
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STATUTES CITED:	
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PART ONE

STATEMENT OF THE CASE

The Petitioner was indicted by the January Term, 1978, DeKalb County, Georgia Grand Jury for the offenses of malice murder and armed robbery. His co-indictees were his brother, Gilbert Jones, and James Ameen.

Following a jury trial, Petitioner was tried separately and convicted on August 15, 1978, on both of the aforesaid counts. The jury found two aggravating circumstances which supported their recommendation for the death penalty under the murder count. The jury found that the murder of victim Frank G. Shelnutt had occurred while the Petitioner had been engaged in the commission of another capital felony: to wit, armed robbery. Ga. Code Ann. § 27-2534.1(b)(2). The second aggravating circumstance found by the jury was that the Petitioner, by his act of murder, armed robbery or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person. Ga. Code Ann. § 27-2534.1(b)(3). Petitioner was thus sentenced to the death penalty for the murder, and received a consecutive life sentence for the armed robbery.

Following the denial of Petitioner's motion for a new trial, he appealed to the Georgia Supreme Court. His convictions were affirmed, and thereafter this Court denied his petitions for a writ of certiorari and for rehearing. Jones v. State, 243 Ga. 820 (1979), cert. den., Jones v. Georgia, 444 U.S. 957 (1979), rehng. den., 444 U.S. 1027 (1980).

Petitioner next filed an application for state habeas corpus relief in the Superior Court of Butts County, Georgia. Following an evidentiary hearing which was held on March 25 and 26, 1980, the Superior Court of Butts County, in an order dated August 4, 1980, denied Petitioner's state petition. Petitioner's application for a certificate of probable cause to appeal to the Georgia Supreme Court was denied on October 8, 1980.

Thereafter, Petitioner filed this second petition for a writ of certiorari, this time challenging the ruling by the Butts County habeas corpus court denying Petitioner's state habeas corpus petition.

Petitioner's assertions in the instant petition pertain to the state habeas court's ruling that Petitioner was not deprived of effective assistance of counsel during his state trial in DeKalb County. Petitioner originally had retained Attorney Ben Adkins as defense attorney for the trial. Petitioner represented that he could not afford to retain an attorney for appeal, and thereafter, on October 31, 1978, Attorney William E. Zachary was appointed by the DeKalb Superior Court to represent the Petitioner. Attorney Zachary filed an extensive motion for new trial, and as a part thereof, alleged that Petitioner's prior attorney, Ben Adkins had been ineffective. A special hearing was held on December 8, 1979, whereat the trial court took evidence pertaining to the alleged ineffective assistance claims against Mr. Adkins. Following the hearing the trial court denied the motion for a new trial.

Thereafter, Petitioner retained another attorney, Brooks Franklin to represent him on appeal to the Georgia Supreme Court. In its opinion on this case, the Georgia Supreme Court notes that Petitioner enumerated some twenty acts or omissions which he had contended illustrated ineffective assistance of counsel. After reviewing the entire record, the Georgia Supreme Court found that Petitioner was not deprived of his right to effective assistance of counsel.

In the habeas corpus action which was filed in the Superior Court of Butts County, Petitioner was represented pro bono, by yet another attorney, Mr. Henry C. Johnson, Jr., who continues to represent Petitioner in this action. Additionally, Attorney Johnson was aided in the state habeas hearing by Attorney Scott McClarity and another attorney, Mr. Harold Miller, who had assisted Attorney Brooks Franklin on Petitioner's

direct appeal to the Georgia Supreme Court.

Relating to Petitioner's state habeas contention that he received ineffective assistance of counsel, the state habeas judge held that, "once this issue has been raised and decided by our Georgia Supreme Court, this Court is bound by the ruling in the decision there made." (See, Appendix A to the Petition). Additionally, the habeas judge noted that Petitioner attempted to enlarge upon his original contentions of ineffective assistance of counsel; however, the new contentions and evidence thereon were insufficient to justify the granting of relief. (Id.).

As noted previously, the Georgia Supreme Court refused to grant Petitioner's application for a certificate of probable cause to appeal from the denial of state habeas relief.

PART TWO

REASON FOR NOT GRANTING THE WRIT

SINCE PETITIONER'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE WERE THOROUGHLY REVIEWED BY THE GEORGIA SUPREME COURT ON DIRECT APPEAL, AND SINCE THE PETITIONER HAS SHOWN NO CHANGE IN THE LAW OR FACTS WHICH JUSTIFY A RELITIGATION OF THAT ISSUE, THE STATE HABEAS CORPUS COURT PROPERLY FOLLOWED ESTABLISHED GEORGIA LAW, AND HELD THAT RELIEF UNDER THIS ALLEGATION WAS NOT WARRANTED.

It has long and consistently been held in Georgia that a state habeas corpus court need not adjudicate an issue which has already been decided by an appellate court on direct appeal, unless there has been a change in either the facts or the law. Zant v. Campbell, 245 Ga. 368, 369, 265 S.E.2d 22 (1980), cert. den., ___U.S.___, 101 S.Ct. 252 (1980); Gibson v. Ricketts, 244 Ga. 482, 483, 260 S.E.2d 877 (1979), cert. den., 445 U.S. 920 (1980); Brown v. Ricketts, 233 Ga. 809, 811, 213 S.E.2d 672 (1975); Andrews v. Alderhold, 201 Ga. 132, 135, 39 S.E.2d 61 (1946), cert. den., 329 U.S. 755 (1946) [cases cited]. The Georgia Supreme Court has recognized that while the doctrine of res judicata has been held inapplicable per se in the federal courts, Brown v. Ricketts, supra, Andrews v. Alderhold, supra, citing Salinger v. Loisel, 265 U.S. 224 (1924), nevertheless, it has also been recognized that notwithstanding the refusal to apply res judicata in federal habeas corpus, successive petitions raising grounds which were or could have been raised earlier need not always be entertained. Id. "[E]ach application is

to be disposed of in the exercise of sound judicial discretion guided and controlled by consideration of whatever has a rational bearing on the propriety of the discharge sought." Salinger v. Loisel, 265 at p. 231. Also see, 28 U.S.C. § 2244. Thus, in cases such as Wong Doo v. United States, 265 U.S. 239 (1924), it has been held that a successive petition need not be entertained where the Petitioner had a full opportunity to offer proof on an issue, but failed to do so even though evidence was accessible to him at the time of the initial hearing. See also, McDonald v. Estelle, 590 F.2d 153, 155 (5th Cir. 1979).

As noted previously, in the instant case, the Petitioner originally retained counsel for his trial. Shortly after his conviction, the state trial court appointed an attorney, who in his motion for a new trial, challenged the effectiveness of the first counsel. Following a hearing on the motion for new trial and denial of same, Petitioner retained another attorney who raised approximately twenty enumerations of error alleging ineffective assistance through acts or omissions of Petitioner's first attorney. Following a thorough review of the entire record, the Georgia Supreme Court found the allegations were without merit. Jones v. State, 243 Ga. at p. 830-831.

In his state habeas action, the Petitioner was represented by yet another attorney, who raised several new allegations of ineffective assistance, in addition to raising many of the same assertions as were raised on direct appeal. At the state hearing, Petitioner made no showing that the new allegations could not have been raised or enumerated in the motion for new trial or on direct appeal, nor did he present any evidence showing a change in the law or facts which would authorize the habeas court's circumventing the decision of the Georgia Supreme Court. Thus, the state habeas judge was justified in applying the established Georgia law, considering himself bound by the decision of the Georgia

Supreme Court. The habeas court also held that the new allegations, upon which Petitioner had presented proof, still did not authorize the granting of relief. See, Appendix A to the petition.

The issues that Petitioner raises in the instant petition pertain, in actuality, to a question of state law relating to the application of Ga. Code Ann. § 50-127, the exclusive state procedure for pursuing a writ of habeas corpus by a person whose liberty is being restrained by virtue of a sentence imposed against him by a state court of record.

If the Petitioner asserts that the rulings of the state courts below have denied him a full and fair hearing on the issue of ineffective assistance, he may assert this claim while filing an application for federal habeas corpus relief, and his argument, of course, will be considered by the district court as required under 28 U.S.C. § 2254(d). However, the application of the state procedural rule does not require plenary review in this forum at this time.

CONCLUSION

For all of the above and foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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